Supreme Court, U.S.
FILED
FEB 6 - 2007
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(3)

No. 06-571

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondent concedes (Opp. 7) that the courts of appeals are deeply and irreconcilably divided on the important question of federal law presented in this case: whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). Nor does respondent dispute that this case, which arises from stipulated facts and a frequently recurring fact-pattern, presents an excellent vehicle to resolve this long-running and entrenched conflict.

Instead, respondent attempts to defeat review by urging: (1) that the significance of the 6-4 split has been "diminish[ed]" (Opp. 8) by Congress's addition in 1998 of a "possession-in-furtherance" prong to § 924(c)(1)(A) (which was not charged here and did not alter the definition of "use"), and by the purported "general" availability of aider-and-abettor liability (Opp. 10-11); and (2) that decisions like the one below, allowing those who receive firearms as a result of drug transactions to be punished for "using" them, are not inconsistent with this Court's decisions in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995). Both of those assertions are mistaken.

First, far from "diminish[ing]" in the more than eight years since the amendment in question was enacted, the conflict over the meaning of "use" has broadened and solidified. That is hardly surprising considering that the provision Congress added in 1998 did not purport to address (and cannot be reasonably construed to reach) the circumstance at issue here. Congress amended § 924(c)(1)(A) to address the dangers posed by individuals who possess firearms "in *furtherance*" of a drug transaction; the amendment did not alter the meaning of "use" (as explicated by this Court's unanimous decision in *Bailey*), nor did Congress criminalize possession of firearms *as a result of* a drug transaction. To suggest otherwise defies the plain meaning and undisputed purpose of the amendment. And the

asserted "availability" of aiding and abetting liability is likewise a red herring: Respondent does not point to a single case in which a defendant who traded drugs for guns has been convicted on an aiding-and-abetting theory (even in those four circuits that have squarely rejected the "use" theory respondent defends here).

Second, respondent's suggestion that it is not necessary to resolve the conflict presented here because the decision below is correct is fundamentally misguided. It is difficult to see how receipt of an unloaded firearm from a government informant constitutes "active employment" of the firearm as required under *Bailey*. In any event, the undisputed fact is that four courts of appeals have squarely rejected respondent's strained reading of § 924(c)(1)(A) in the wake of *Bailey*, and it is for this Court (not the government) to resolve that dispute and give much-needed guidance to the lower courts.

I. Respondent Concedes A 6-4 Conflict Among The Circuits On The Important Question Of Federal Criminal Law Squarely Presented By This Case

As it did below (Gov't C.A. Br. 17), respondent expressly concedes that the federal courts of appeals are deeply divided on the question presented here. See Opp. 7 ("Petitioner correctly notes * * * that the courts of appeals disagree on whether trading drugs for a firearm constitutes the 'use' of a firearm within the meaning of Section 924(c)(1)(A).").

As explained previously (Pet. 7-10), the Fifth Circuit's decision in this case directly conflicts with decisions of the Sixth, Seventh, Eleventh, and D.C. Circuits, each of which has held that 18 U.S.C. § 924(c)(1)(A) – which provides for lengthy additional punishment for those who "use" a firearm during and in relation to a drug trafficking offense – does not extend to individuals like petitioner who receive a gun in exchange for drugs.[1] Those decisions rest on the

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[1] Respondent half-heartedly suggests (Opp. 8 n.2) that the decisions of the Sixth and Seventh Circuits might be limited to their facts. Both

unbridgeable gap between the ordinary and, after *Bailey*, well-settled meaning of the word "use" in § 924(c)(1)(A) (active employment) and the wholly passive act of mere receipt. Five other courts of appeals – the First, Third, Fourth, Eighth, and Ninth Circuits – have reached the contrary result, although two of those courts have confessed the awkwardness inherent in that construction. See *United States* v. *Cotto*, 456 F.3d 25, 28 (1st Cir. 2006) (explaining that, were it "writing on a blank slate," the court "might well be inclined" to join the courts holding "based on the most natural reading of the statute" that a defendant does not "use" firearms "by bartering for them"); *United States* v. *Sumler*, 294 F.3d 579, 583 (3d Cir. 2002) (acknowledging that the Seventh Circuit's decision in *United States* v. *Westmoreland*, 122 F.3d 431, 435 (1997), "advanced a forceful argument in declaring 'there is no grammatically correct way to express that a person receiving a payment is thereby "using" the payment'").

Moreover, respondent does not challenge the importance of the disputed statutory provision. See Pet. 17-19. A defendant convicted in any of the four circuits that treat receipt of a gun in a barter transaction as "use" of a firearm under § 924(c)(1)(A) faces a mandatory minimum sentence of at least five years, which must be served consecutively to the sentence for the underlying drug offense. See 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). For offenders with prior convic-

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courts, however, ruled broadly that mere receipt of a firearm is not "use" under § 924(c) because it does not constitute active employment of the firearm as required by *Bailey*. See *United States* v. *Warwick*, 167 F.3d 965, 976 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997). Even the minimalist reading of those cases urged by respondent does not affect the conflict between those decisions and the one below. Indeed, the very facts highlighted by the Sixth and Seventh Circuits in holding the "use" provision inapplicable – namely, the significant role of a government informant in devising and consummating the charged transaction – were indisputably present in this case, and those facts did not deter the Fifth Circuit from affirming petitioner's conviction. See Pet. App. 1a, 2a.

tions (such as petitioner), the statute may have an even greater impact by virtue of the career offender enhancements prescribed by the federal sentencing guidelines. Here, simply because the events at issue took place in Ascension Parish, Louisiana, and not, say, a few hundred miles east in the Eleventh Circuit, petitioner received an additional *nine years'* imprisonment. Simply put, § 924(c)(1)(A) is of tremendous real-world significance to prosecutors and defendants alike, which further underscores the need for this Court to resolve the undisputed inconsistency in its interpretation and application.[2]

Finally, respondent does not contest that this case is an excellent vehicle for resolving this question. As respondent acknowledges (Opp. 3), petitioner's conviction arose from a conditional guilty plea upon stipulated facts, Pet. App. 8a-11a, to an indictment charging violation of only the "use" provision of § 924(c)(1)(A). Moreover, the underlying facts – a government agent/informant's active role in attempting to ensure that the underlying drug transaction could support a charge under § 924(c)(1)(A) – are fundamentally similar to those giving rise to decisions on both sides of the circuit split. See, *e.g.*, *United States* v. *Warwick*, 167 F.3d 965, 970 (6th Cir. 1999) (undercover officer claimed "he did not have enough money to pay for the marijuana * * * and offered to exchange [firearm] as partial payment").

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[2] Respondent does not dispute the evidence concerning the pervasiveness of these sentencing enhancements. See Pet. 17. Indeed, in the years 1992 to 1998, a total of 11,303 defendants received enhanced sentences under § 924(c)(1)(A). U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Firearm Offenders, 1992-98, at 9 (2000). The government's propensity to seek such enhancements shows no sign of abating. The most recent data available show that in 2005 *alone*, 3,788 individuals received enhanced minimum sentences for weapons involvement (under either § 924(c)(1)(A) or a sentencing guidelines provision). See U.S. Sentencing Comm'n, 2005 Sourcebook of Federal Sentencing Statistics 102, 320.

II. The Significance Of The Conflict Is Not Mitigated By Congress's Addition Of The "Possession In Furtherance" Prong To § 924(c)(1)(A) Or By The Aiding-And-Abetting Statute

Unable to dispute the deep division among the courts of appeals, respondent labors to create the impression that this is the sort of 6-4 circuit split that may be safely ignored. To that end, respondent first points to a 1998 law Congress enacted in the wake of this Court's decision in *Bailey*. See Opp. 8-9. That enactment – which left undisturbed the "use" provision at issue in this case and in *Bailey* – amended § 924(c)(1)(A) to punish those "who, *in furtherance* of [a drug trafficking crime], possess[] a firearm." Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (emphasis added). Respondent also invokes the general "aiding and abetting" provision, 18 U.S.C. § 2, and asserts that it is "generally" available to prosecute those who trade drugs for weapons. In respondent's view, the disagreement among the circuits regarding whether receipt is "use" does not really matter because that conduct "generally" could be prosecuted under the amendment to § 924(c) or as aiding and abetting a § 924(c) offense. Opp. 8, 10. Respondent is mistaken on both counts.

1. For starters, the assertion that the amendment to § 924(c)(1)(A) diminished the significance of the conflict over "use" is contrary to real-world experience. In the more than eight years since Congress passed the amendment, the conflict has only widened and deepened. See, *e.g.*, *Cotto*, 456 F.3d 25; *United States* v. *Watson*, Pet. App. 1a (5th Cir. 2006) (unpublished); *United States* v. *Montano*, 398 F.3d 1276 (11th Cir. 2005); *United States* v. *Short*, 55 Fed. App'x 183 (4th Cir. 2003) (unpublished); *Sumler*, 294 F.3d 579; *United States* v. *Stewart*, 246 F.3d 728 (D.C. Cir. 2001); *Warwick*, 167 F.3d 965; *United States* v. *Belcher*, 1999 WL 1080103 (4th Cir. 1999) (unpublished); *United States* v. *Sanchez*, 2006 WL 472739 (D. Utah 2006) (unpublished); *United States* v. *Trotter*, 2005 WL 2239479 (D. Kan. 2005) (unpublished). As

this case and recent decisions by other courts demonstrate, there is indisputable evidence both that prosecutors continue to indict and prosecute defendants under the theory that receipt is "use," and that courts continue to disagree about the legitimacy of doing so.

It should come as no surprise that the 1998 amendment has had little impact on this issue, because Congress did not purport to change the law respecting drugs-for-firearms transactions. The amendment was aimed, instead, at the entirely different circumstance at issue in *Bailey*: a criminal who maintains a gun in proximity to a drug deal in order to embolden his participation in the transaction. The amendment, simply put, was designed to reverse the result in *Bailey*, not to disturb this Court's interpretation of the term "use."

The plain meaning of the language Congress enacted cannot be stretched to cover the circumstances at issue here. A firearm is not "possessed in furtherance" of a drug transaction when it is momentarily received simply *as a consequence* of the completed transaction. Just as "[a] seller does not 'use' a buyer's consideration," *Westmoreland*, 122 F.3d at 436, it is equally unnatural to say that a seller "possesses" a buyer's consideration "*in furtherance*" of a completed sale. For example, had the government informant here purchased drugs from petitioner with a $100 bill, it would defy ordinary understanding to describe petitioner as possessing the $100 bill "in furtherance of" the already-completed transaction. Indeed, where Congress specifically intends to refer to consideration received as payment in an illicit transaction, it employs language bearing little resemblance to the possession-in-furtherance provision upon which respondent relies here. See, *e.g.*, 18 U.S.C. § 982(a)(2) (requiring criminal forfeiture of "any property *constituting*, or *derived from*, *proceeds* the person obtained directly or indirectly, *as the result of* such violation") (emphasis added).

Accordingly, respondent's speculation that "an individual who trades drugs for firearms will *generally* be subject to

prosecution and punishment" and that "'trading drugs for a gun *will probably* result in'" prosecution for possession in furtherance, Opp. at 8–9 (quoting *United States* v. *Cox*, 324 F.3d 77, 83 n.2 (2d Cir. 2003) (emphasis added)), represents little more than wishful thinking. Courts have applied that provision almost exclusively in cases where a drug trafficker's possession of a gun promoted – in the ordinary and concrete, rather than the metaphysical, sense of the word – his illegal activity, *e.g.*, *United States* v. *Iiland*, 254 F.3d 1264, 1272-1273 (10th Cir. 2001), and most courts have developed multi-factor tests aimed at deciding that question.[3] Those standards, fairly applied to drugs-for-gun deals such as this one, would not yield the convictions respondent suggests are readily available.[4] Petitioner's momentary receipt of the

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[3] For example, courts typically instruct jurors to consider, among other factors, whether the firearm was loaded, how accessible the firearm was to the defendant, and the proximity of the firearm to drugs or proceeds. See *United States* v. *Ceballos-Torres*, 218 F.3d 409, 414-415 (5th Cir. 2000); see also *United States* v. *Lomax*, 293 F.3d 701, 705 (4th Cir. 2002); *United States* v. *Timmons*, 283 F.3d 1246, 1253 (11th Cir. 2002); *United States* v. *Wahl*, 290 F.3d 370, 376 (D.C. Cir. 2002); *United States* v. *Basham*, 268 F.3d 1199, 1206-1207 (10th Cir. 2001); *United States* v. *Mackey*, 265 F.3d 457, 462 (6th Cir. 2001).

[4] Respondent identifies a single decision that appears to embrace its peculiar view of the possession-in-furtherance prong (Opp. 9 (citing *United States* v. *Frederick*, 406 F.3d 754, 764 (6th Cir. 2005))), but that does not explain why the Seventh, Eleventh, and D.C. Circuits have not followed suit. Nor, in any event, is the Sixth Circuit's departure from the plain language and purpose of the 1998 amendment a sound basis for denying the need to review the question presented here, upon which 10 circuits are squarely divided.

In fact, several courts have recognized that Congress intended the phrase "in furtherance" to require more than that a firearm was somehow connected to a drug trafficking crime. See, *e.g.*, *United States* v. *Delgado-Hernandez*, 420 F.3d 16, 25 (1st Cir. 2005) ("[T]he 'in furtherance of' element of a firearm possession charge imposes a 'slightly higher standard' of liability than the nexus element corresponding to the different charges of using or carrying a firearm, which need only occur 'during and in relation to' the underlying

unloaded gun, handed to him by a government informant upon completion of the transaction, did not "further" anything. Indeed, as explained below, participation of government agents or informants appears to be the rule, rather than the exception, in § 924(c)(1)(A) prosecutions involving drugs-for-gun transactions. See *infra* pp. 8-9.

2. Respondent's attempt to enlist the aiding-and-abetting statute, 18 U.S.C. § 2, in service of its effort to minimize the conflict as to the meaning of "use" (Opp. 10) is even more ill-conceived. While respondent broadly claims that aiding-and-abetting charges are "routinely" brought in connection with § 924(c)(1)(A) (*ibid.*), it points to no case imposing such liability in a drugs-for-gun transaction. If aiding-and-abetting liability were truly the panacea respondent claims, one would expect to see some evidence of it, particularly in the four circuits that have squarely held that mere receipt of a gun in a drug transaction does not constitute "use." In fact, respondent's suggestion that it is "routine" to prosecute those who purchase drugs or firearms for "aiding and abetting" persons on the other side of the transaction (Opp. 10 (citing *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996))), is demonstrably false. *Price* itself did not concern a drug transaction; it involved a defendant who robbed a bank while his accomplice held the teller at gunpoint. See 76 F.3d at 527. And of the twelve decisions *Price* cites as evidence that convictions for aiding and abetting § 924(c) offenses are common, *not one* involved a drug seller "aiding and abetting" the use of a firearm by a drug purchaser. See *id.* at 529.

Moreover, while respondent wisely restricts its claim regarding the "general[]" availability of aiding and abetting liability to circumstances "where the individual who supplies the drugs is not a government agent," Opp. 10, that qualification only underscores why charges for aiding and

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crime."); *Iiland*, 254 F.3d at 1274 ("The legislative history of the 1998 amendments directs that the 'in furtherance' requirement for possession is an even higher standard.").

abetting are inapposite to the exchange at issue here. Nearly all of the reported drugs-for-guns cases involved the use of undercover government agents or informants. See, *e.g.*, *Cotto*, 456 F.3d 25 (involving transaction in which a government agent provided the firearm); *Watson*, Pet. App. 1a (same); *Montano*, 398 F.3d 1276 (same); *Stewart*, 246 F.3d 728 (same); *Warwick*, 167 F.3d 965 (same); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997) (same); *Westmoreland*, 122 F.3d 431 (same); *United States* v. *Cannon*, 88 F.3d 1495 (8th Cir. 1996) (same); *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996) (same); *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994) (same). In short, whatever role 18 U.S.C. § 2 may have in prosecuting § 924(c)(1)(A) offenses "generally," it has little (if anything) to do with the issue presented here.

III. Respondent's Attempt To Defend The Merits Of The Decision Below Is Unavailing And Only Underscores The Need For This Court's Review

Respondent's effort to defeat review by arguing that receipt of a firearm fits "squarely" within the definition of "use" articulated in *Smith* and *Bailey* (Opp. 5-7, 9 n.3) fares no better. Respondent first implies that *Smith* tacitly answered the question presented here when "[t]he Court observed that Section 924(d) included offenses in which the firearm was used 'as an item of barter or commerce,' such as, *inter alia*, the 'unlicensed receipt of a weapon from outside the State, in violation of § 922(a)(3).'" *Id.* at 4 (quoting *Smith*, 508 U.S. at 234 & n.*). Respondent fails to notice, however, that the relevant portion of § 924(d)(1) – which is a separate provision dealing with forfeiture of firearms and ammunition – refers not just to firearms that are *actually* "used" in a particular offense (as is required under the provision at issue here), but also to firearms that are merely "*intended* to be used" in the specified offenses. That distinction is highly significant: "Intended" use more naturally relates to offenses involving importation or receipt, whereas "actual" use is consistent only

with the "active employment" test established in *Bailey*. In any event, it is evident that *Smith* did not make the leap respondent suggests. In the sentence following the footnote upon which respondent relies, the Court stated that "it is clear from § 924(d)(3) that one who *transports, exports, sells, or trades* a firearm 'uses' it within the meaning of § 924(d)(1)." *Id.* at 234-235 (emphasis added). Notably, the Court did *not* include the words "imports," "buys," or "trades for" (or any of their synonyms) in that list.[5]

More fundamentally, respondent does not seriously attempt to reconcile its theory with the plain meaning of the word "use," nor does respondent confront the common-sense explanation that "[a] seller does not 'use' a buyer's consideration." *Westmoreland*, 122 F.3d at 436; see Pet. 10-11. Before accepting an invitation to ignore a 6-4 circuit split on the interpretation of an important federal criminal statute, this Court should require respondent to employ its construction in a grammatically intelligible manner. Defendants facing minimum consecutive sentencing enhancements deserve no less.

In any event, respondent's attempt to justify its reading under *Smith* and *Bailey* – a view that has been squarely rejected by four courts of appeals – only highlights the pressing need for this Court's intervention. Disputes over the meaning of a significant federal statute should be resolved on the merits, particularly when the controversy stems from conflicting interpretations of prior decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Nor, contrary to respondent's suggestion (Opp. 6), did *Bailey* hold that consideration received in exchange for drugs is an "operative factor" that is therefore "actively employed" in the transaction. Respondent does not attempt to define what qualifies as an "operative factor," but, as previously explained (Pet. 11-16), it would be quite difficult to square the remainder of the Court's opinion in *Bailey* with the conclusion that "active employment" means simple receipt.

Respectfully submitted.

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FEBRUARY 2007